THE FEDERAL MEDIATION AND CONCILIATION SERVICE
BEFORE
ARBITRATOR JOHN TRUESDALE

In the Matter of:	)	
FOP/MPD LABOR COMMITTEE, UNION,	)	**CLASS GRIEVANCE - AHOD**
AND	)	**FMCS CASE NUMBER 09-54894**
METROPOLITAN POLICE DEPARTMENT, AGENCY.	)	

MOTION FOR RECONSIDERATION

The Metropolitan Police Department (MPD) requests that the arbitrator reconsider his decision dated September 9, 2009. This request is necessary for two reasons. First, relief is warranted because of the misconduct of the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) in deliberately concealing a critical exhibit during the hearing for the sole purpose of gaining an advantage through unfair surprise. Second, the All Hands on Deck (AHOD) initiative has been an unqualified success. The arbitrator's decision is wrong, causes the City unwarranted financial harm and throws a shadow over the AHOD. Given the manifest injustice that would result from rewarding the FOP's tactic, MPD requests reconsideration of the decision in this matter, or in the alternative, that the matter be reopened for additional testimony and evidence.

The AHOD Initiative

It is important to acknowledge the substantial and demonstrable impact the AHOD initiative has had on crime in the District of Columbia over the course of the past two-and-a-half years. The impact of AHODs in 2009 alone has been dramatic: crime data reflect sizeable

decreases in crime during almost all of the AHOD implementation periods when compared to the same period last year. The statistics bear out the undeniable success of the program: a 33% decrease in crime during the April 24-26 AHOD; a 16% decrease in crime during the June 5-7 AHOD; a 16% decrease in crime during the June 26-28 AHOD; a 12% decrease in crime during the July 10-12 AHOD; a 23% decrease in crime during the July 24-26 AHOD; and a 2% decrease in crime during the August 3-5 AHOD.

But the success of the AHODs goes well beyond what is often too cavalierly dismissed as "statistics." There are both societal dimensions and thoughtful crime reduction components to the program that are often overlooked. Reductions in crime are not merely numbers without meaning. In human terms, reducing crime means that fewer citizens and visitors to the District of Columbia will suffer the often life-altering trauma of being victimized. For this very reason, the AHOD program focuses on a goal of prevention, and predictive, rather than reactive, implementation. This rationale also supports the chosen method of implementation--a total mobilization of all sworn members of the Department. While flooding high crime areas with officers undoubtedly deters crime in the short term, the complete mobilization is often misunderstood.

The AHOD initiative has never been about mere police presence and visibility. Instead, AHODs, and all of the community-focused events sponsored by the Department during AHODs, have always emphasized the importance of our members interacting with members of the community as a means to increase familiarity and trust with the goal of fostering increased communication. Obviously, such efforts are not successful overnight, but as successive AHOD phases have been implemented over the years, residents bear witness to our commitment to them and their communities, and the channels of communication are forged. The importance of this

communication cannot be overstated. Information from citizens is crucial not only for purposes of solving crimes once they have been committed, but also for the purpose of preventing crimes before they occur. As an example, to date in 2009, homicides in the District of Columbia have dropped to historic lows. Our homicide closure rates are at historic highs. The hard work of our members certainly plays a critical role in both of these successes. But there can be no doubt that the increased communication between residents and the police--fostered in no small part by nearly three years of AHOD deployments and constantly developing lines of communication between residents and the police--has contributed to our success in crime prevention and solving.

Thoughtful evaluation of this Motion for Reconsideration is particularly warranted given the incontestable authority of the Chief of Police to continue implementing the AHOD initiatives. As explained below, regardless of whether or not there was ever a gap in the Mayor's delegated authority, it is clear that the Chief of Police possessed the relevant authority in the past and still possesses it today. The Chief's present and future authority to change members' schedules will not be affected even were an appeal to be denied. Given the success of the AHOD program, the Chief will exercise her authority to continue the program. Thus, if the decision is allowed to stand, the net effect of an award that compels the Department to pay members overtime (even though AHODs are specifically scheduled to occur within members' 40-hour workweeks without requiring any overtime work) will be to reduce the resources available to the Department for crime-fighting efforts--resources that are even more precious and scarce given the bleak budgetary situation faced by the Department.

FOP's Misconduct

Most fundamentally, FOP's misconduct compels the conclusion that reconsideration is necessary in light of the contractual violation committed by the FOP during the hearing of this case and the harm to MPD caused by that violation. Specifically, the FOP concealed an exhibit (Union Exhibit 20, Mayor's Order 2008-92) that it intended to rely upon in the presentation of its case. The arbitrator's admission and subsequent reliance on that precise exhibit as the foundation for his decision irreparably harmed MPD.

As described during the hearing, the Chief of Police implemented the AHOD initiatives beginning in 2007, utilizing authority delegated to her by the Mayor in Mayor's Order 2000-83. Attachment A (Mayor's Order 2000-83, May 30, 2000). Notably, despite filing grievances on virtually every AHOD since their inception in 2007, the FOP elected not to pursue any of the 2007 or 2008 grievances to arbitration. This includes grievances and demands for arbitration on one of the AHODs that was scheduled and implemented in 2008 (Attachment B)--subsequent to the issuance of Mayor's Order 2008-92 (Mayor's Order 2008-92, June 26, 2008). This is the exhibit introduced by the FOP for the first time at the hearing in this matter. The FOP also filed grievances related to two more of the 2009 AHODs. Attachment C. These grievances were filed after the issuance of Mayor's Order 2008-92, after the grievance at issue in this case, but before the hearing that was held in this matter. Yet nowhere in any of these grievances or demands for arbitration did the FOP ever make any reference, allusion, or citation to Mayor's Order 2008-92. The FOP has provided no explanation for its failure to cite Mayor's Order 2008-92 in any of these matters.

The record as it pertains to this case is similarly clear: the FOP provided the Department with no notice of its intent to introduce, reference, or in any way rely on Mayor's Order 2008-92

prior to the hearing on June 17, 2009. In fact, the FOP concealed its intent to introduce Mayor's Order 2008-92 on the day of the hearing itself. On the morning of the hearing, the FOP presented the Department a binder titled "Exhibits of DCFOP," which were numbered 1 through 17. The FOP made no representation at the time of production that there would be any supplementation of these exhibits. Similarly, when the parties returned following the lunch break, the FOP made no additional proffer of exhibits. It was only during the FOP's cross-examination of Assistant Chief Alfred Durham that the FOP presented an additional stack of documents and stated "Here's [FOP Exhibits] 18 through 25. You can put them in the binder at the end just for ease of reference." (Transcript, p. 185.) The FOP's reference was to eight additional exhibits, already marked and prepared by the FOP but not previously disclosed to MPD or to the witness. Among these exhibits was Mayor's Order 2008-92 designated by the FOP as Union Exhibit 20. Thus, it was only at this point, following a six-month grievance and arbitration process and more than halfway through the arbitration hearing, that the FOP identified and introduced for the first time the exhibit which the FOP apparently believed critical to its case. Indeed, the arbitrator was persuaded to rely upon it in coming to his decision. *See e.g.,* Opinion and Award at 25 ("The record is clear that at the time [the Chief of Police's] delegated personnel and rule-making authority had been rescinded by Mayor's Order 2008-92.").

The FOP's tactic, particularly the fact that the exhibit was marked and prepared by the FOP in advance yet deliberately withheld from disclosure until the last possible moment, reflects a calculated intent both to create unfair surprise and to benefit from such surprise. These tactics are explicitly prohibited by the parties under the CBA. Indeed, Article 19 Part E, Section 5(2) of the parties CBA reads:

> The parties to the grievance or appeal ***shall not be permitted*** to assert in such arbitration proceedings any ground or ***to rely on any evidence not previously disclosed to the other party***.

(Union Exhibit 1, p. 24 (emphasis added)). The reasoning behind this mandatory bargained-for and agreed-upon provision is obvious: for the grievance and arbitration process to be both efficient and fair, the parties "shall" disclose all information and evidence relied upon in asserting their respective positions. This requirement ensures that the issues and the evidence presented in each grievance and arbitration are fully known to both parties, avoiding the potential for mistake and misinterpretation. Obviously, such a provision is also designed to prevent tactics that would create unfair surprise such as those employed in this case. In these regards, the provision is similar to the pre-trial discovery requirements under both the federal and local rules of civil procedure.[1]

While the Department satisfied its obligation under the labor agreement by fully disclosing to the FOP all evidence upon which it relied both in considering the FOP's grievance and in presenting the Department's position at arbitration, the FOP violated the contract by failing to disclose its intention to utilize or rely on Mayor's Order 2008-92.

There is a recognized and equitable remedy for the FOP's violation--permitting MPD time and an opportunity to respond to the undisclosed new evidence. Stated succinctly, the principle is that

> whatever element of unfairness may be involved in the use of new evidence, it is largely mitigated or eliminated by the fact that arbitrators who accept newly submitted evidence will take any reasonable steps necessary to ensure the opposite party adequate opportunity to respond thereto . . . .

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[1] *See* U.S. DISTRICT CT. RULES FOR THE DISTRICT OF COLUMBIA LCvR 16.5(b)(6) ("The [pretrial] list of exhibits shall set forth a description of each exhibit the party may offer in evidence (other than those created at trial), separately identifying those which the party expects to offer and those which the party may offer if the need arises."). *See also* D.C. SCR-Civil Rule 16(c)(5). The purpose of these rules mirrors the purpose of the labor agreement provision, namely to focus the disposition of the case on the merits and "to remove cases from the realm of surprise." *Redding v. Capitol Cab Co.*, 284 A.2d 54, 55 (D.C. 1971) *citing All Weather Storm Windows, Inc. v. Zahn*, 112 A.2d 496, 497 (Mun. Ct. App. D.C. 1955).

Elkouri and Elkouri, How Arbitration Works 437 (5th ed. 1996) (*Elkouri*). In this case, despite the fact that evidence not previously disclosed to a party was introduced for the first time at the arbitration hearing, MPD was not afforded this remedy. Not only was MPD denied the opportunity to respond to the FOP's misconduct, the arbitrator's decision then cited the concealed evidence as the basis for his decision, compounding the harm to MPD by rewarding the FOP for its trial tactics.

Consistent with established principles, MPD then asked the arbitrator to reopen the hearing. The evidence that would have been proffered--as we show below--would have been relevant, likely to affect the outcome, and would not have improperly prejudiced the other party. All of these factors are cited as "common sense" grounds for reopening a hearing to explore newly discovered evidence. *Elkouri* at 382-383. However, despite the overwhelming equities favoring reopening of the hearing, the arbitrator denied MPD's request, affording it no opportunity whatever to rebut the FOP's exhibit.

Reopening the record would have demonstrated that the facts and the law are not legitimately in dispute. Mayor's Order 2000-83 delegated all of the Mayor's personnel authority under the Comprehensive Merit Personnel Act (CMPA) to the Chief of Police. The CMPA is codified at D.C. Official Code § 1-601.01 *et seq.* and includes the scheduling provision at D.C. Official Code § 1-612.01 specifically at issue in this case. As a result of the delegation, the Chief of Police had the statutory authority, in addition to the express language in Article 4 of the parties' CBA, to alter members' schedules within a workweek. This is precisely what she did with the AHOD initiatives, exercising her delegated statutory authority and contractual management right in determining that costs would be significantly increased or the organization

would be seriously handicapped in carrying out its functions if members' schedules were not altered for brief periods of time.

On June 5, 2008, the Mayor issued another delegation of personnel authority. This delegation authorized specified agency heads "to function as personnel authority in the area of recruitment and selection for all Career, Legal, and Management Supervisory Services positions." Attachment D (Mayor's Order 2008-81, dated June 5, 2008). In addition to the general delegation of authority, the Chief of Police was also delegated the Mayor's personnel and rulemaking authority under several specified sections of the D.C. Official Code. *See e.g., ibid.,* Part F, §§ 1-5. Notably, this separate Order did not rescind, nor did it even reference, any of the Chief of Police's personnel authority delegated previously pursuant to Mayor's Order 2000-83. The two Orders were unconnected to one another, at least facially.

On June 26, 2008, the Mayor issued the Order that was introduced for the first time by the FOP during the arbitration hearing in this matter. Attachment E (Union Exhibit 20). Mayor's Order 2008-92, dated June 26, 2008, centralized specified personnel and rulemaking authority with the Director, D.C. Department of Human Resources. It also expressly rescinded Mayor's Order 2000-83, which had granted the Chief broad personnel and rulemaking authority. Notably, however, this new Mayor's Order 2008-92 did not affect Mayor's Order 2008-81, which contained more specific delegations of personnel and rulemaking authority to the Chief of Police. Indeed, as stated in the attached Declaration of D.C. Human Resources Director Brender Gregory (*see* Attachment F), the reason Mayor's Order 2000-83 had been rescinded was because it was believed that the new Mayor's Order 2008-81 captured all of the existing essential delegations of Chief of Police authority, including those relating to the alteration of members' schedules within a workweek. When it was learned during this hearing on June 17, 2009, that the

broader, general term "*personnel authority*" was missing from the new order, it was immediately remedied on June 19, 2009, by adding the term "*personnel authority*" *nunc pro tunc* to the list of delegated authority in Mayor's Order 2008-81 (*see* Mayor's Order 2009-117, Attachment G). This critical evidence would have been presented at a reopened hearing.

In sum, the purpose of the rescission in Mayor's Order 2008-92 was to create consistency across the District government for non-sworn civilian employees in the area of compensation and classification only. Mayor's Order 2008-92 was never intended to rescind *any* of the Chief of Police's personnel authority relevant here (*i.e.,* the authority to alter member's schedules). It was issued because Mayor's Order 2008-81 was designed to centralize all personnel authority over civilian District government employees (including the civilian, unsworn employees of MPD) in the D.C. Department of Human Resources and should have partially rescinded Mayor's Order 2000-83 to achieve that limited purpose. The rescission of Mayor's Order 2000-83 by Mayor's Order 2008-92 – which appeared to re-delegate all of the Chief of Police's personnel authority to the D.C. Department of Human Resources – was a mistake.

Even with this mistake, however, the Mayor was not without authority to take corrective action. He did so by issuing another Mayor's Order — Mayor's Order 2009-117 — with an effective date *nunc pro tunc* to June 5, 2008. It is well settled that retroactive government action is permissible and appropriate. In *United States v. Carlton,* 512 U.S. 26 (1994), the Supreme Court permitted the retroactive application of an amendment to a federal tax statute limiting the availability of a deduction to a decedent's estate. Attachment H. There, the Supreme Court imposed a two-part test for determining whether the retroactive repeal of a tax benefit was appropriate. First, there must not be an "improper motive" with regard to the retroactive effect. Second, there must have been only a "modest period of retroactivity." *Id.* at 32. In that case, the

Court held that a mistake had occurred when Congress created a tax loop-hole that had the unintended effect of resulting in as much as $7 billion in lost revenue — over 20 times greater than anticipated. Moreover, the period of time between the initial legislation in *Carlton* and the legislative fix was slightly more than a year. *Id.* at 33. The circumstances here are no different and indeed more compelling.

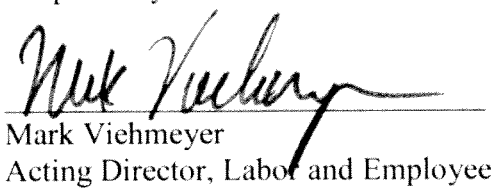
As soon as the existence of Mayor's Order 2008-92 was disclosed to the Department in the hearing in this matter, the inadvertent error was corrected. Two days after the hearing, on June 19, 2009, the Mayor signed Mayor's Order 2009-117. As stated, Mayor's Order 2009-117 amended Mayor's Order 2008-81 "for the purpose of including language inadvertently omitted" from that Order. Mayor's Order 2009-117 corrected this error by re-delegating the Mayor's relevant "personnel" authority over sworn members to the Chief of Police effective *nunc pro tunc* to June 5, 2008.

The arbitrator failed to assess correctly the applicability of Mayor's Order 2009-117. His conclusion that it "would not have survived the explicit June 26, 2008 rescission in Mayor's Order 2008-92" (Opinion and Order at 23) is wrong as both a matter of fact and as a matter of law. Mayor's Order 2008-92 *only* rescinded Mayor's Order 2000-83. Contrary to the arbitrator's assertion, Mayor's Order 2008-92 contains no reference whatsoever to Mayor's Order 2008-81. Accordingly, both Mayor's Order 2008-81 (as amended by Mayor's Order 2009-117) and the Chief's personnel authority delegated pursuant thereto, remain in effect.

The relevant and applicable legal foundation for the Chief's AHOD initiatives is beyond dispute. Since 2000, the Chief of Police has possessed, as a matter of law, uninterrupted legal authority to change members' schedules within the workweek and to continue the AHOD crime-

fighting initiatives. Rather than reward the FOP's misconduct, the arbitrator should grant reconsideration and provide appropriate relief.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing "Motion for Reconsideration" with attachments was emailed and served via first class mail on this 18th day of September, 2009 to:

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